York Times and Washington Post, a National Intelligence Estimate prepared last April concludes that the war in Iraq has made the problem of global terrorism worse and that terrorist cells have metastasized and spread across the globe.

For more than 3 years, President Bush and the Republican Congress have repeatedly claimed the war in Iraq is making America safer. Now, we learn that the 16 agencies in the intelligence community concluded just the opposite last April—that the Iraq war has become a rallying cry for extremists against the United States and made the war on terror more difficult to win.

The American people have the right to hear from our Nation's top intelligence official about the conclusions of the intelligence community in this report. Before Congress adjourns this week, Director of National Intelligence John Negroponte should testify in open session about this report. In addition, an unclassified version of the key judgments and discussion about Iraq in the report should be made available to the public in a way that protects sources and methods.

With more than 140,000 American troops on the ground in Iraq and terrorist attacks increasing around the globe, the stakes for the safety of all Americans are enormously high. It is our obligation to hear directly from Mr. Negroponte before adjourning at the end of this week. It is essential that Congress and the American people obtain a fuller understanding about the conclusions of the intelligence community about the impact of the Iraq war.

In addition, the President and Vice President must explain statements they have made that are directly at odds with this National Intelligence Estimate.

Despite the conclusion of the intelligence community that the war has been a recruitment tool for a new generation of extremists, on numerous occasions since the document was prepared, President Bush has claimed that the war has made America safer.

On September 7, President Bush said:

> We've learned the lessons of 9/11 * * * We've gone on the offense against our enemies, and transformed former adversaries into allies. We have put in place the institutions needed to win this war. Five years after September the 11th, 2001, America is safer—and America is winning the war on terror.

On September 11, President Bush said:

> Saddam's regime posed a risk that the world could not afford to take. The world is safer because Saddam Hussein is no longer in power.

Despite the conclusion of the intelligence community 5 months earlier that new threats are emerging because of the war in Iraq, Vice President CHENEY said the exact opposite on September 10. He said:

> We are better off there because of what we've done to date. We are less likely to have a threat emerge against the United States from that corner of the world than would have been the case if Saddam were still there.

The American people deserve to know whether the President and Vice President are intentionally misleading us about our safety or whether they are simply ignoring the intelligence community. Clearly, America deserves better from its leaders.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. CORNYN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded. I ask to speak for up to 20 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CORNYN. I ask unanimous consent I be permitted to speak for up to 20 minutes in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

TERRORIST TRIBUNALS

Mr. CORNYN. Mr. President, one of the lessons America learned after the tragic events of September 11, 2001, is the danger of treating our fight against global terrorism as a law enforcement function alone. This was documented time and time again, whether it is the wall that was erected that prevented intelligence authorities from getting access to important information and sharing it with law enforcement authorities, and vice versa, or whether it was waiting until a terrorist attack occurred and then merely investigating in the rubble and the destruction left behind, and then prosecuting the person, if, in fact, he could be prosecuted and brought to justice.

It concerns me a great deal that we have seemed to lapse once again into a pre-September 11 mindset where some of our colleagues, as we debate the use of terrorist tribunals and the access to our court system those convicted of war crimes should have, seem to have forgotten some of those lessons learned from September 11. It is important we not fight this global war on terrorism strictly as a law enforcement matter, punishing conduct after the fact rather than gaining intelligence we need in order to detect, deter, and disrupt terrorist attacks from occurring in the first place. Specifically, I will address what sort of avenues of appeal detainees at Guantanamo Bay should have regarding their convictions and their status review.

Members may recall late last year the Congress passed something called the Detainee Treatment Act in which we thought we had dealt comprehensively with the issue of how detainees, unlawful combatants, should be treated. Of course, we reiterated our commitment, the ban against torture, cruel and inhumane and degrading conduct, but in that important piece of legislation, Congress also said that detainees, these unlawful combatants, people who do not observe the laws of war, who target innocent civilian populations, are not entitled to receive the full panoply of rights accorded to American citizens when tried in an Article III court of law.

Specifically, we said that for the writ of habeas corpus that otherwise might be available to them, we would substitute an alternative procedure composed of three different things. We created the combat status review tribunal, first, which was designed to make sure the individuals who are actually detained at Guantanamo Bay were, in fact, enemy combatants, and to make sure we did not in the course of or in the fog of war sweep up innocent bystanders who were not actually a threat to the United States. These combat status review tribunals have very important procedures I will mention in a moment.

However, we also saw the use of administrative review boards that on an annual basis review the status of a particular detainee at Guantanamo Bay to determine, No. 1, whether they were a continuing threat to the American people or our allies, and, No. 2, whether additional actionable intelligence could be obtained from them during the interrogation process.

This administrative review board is an annual process and has resulted in the release of many of the detainees who were at Guantanamo Bay who had been determined to no longer be a danger to the American people or our allies.

The fact is these two procedures—the combatant status review tribunal and the administrative review board—are coupled together with an additional right of appellate review provided under the Detainee Treatment Act which is full review of a conviction by a military commission by the District of Columbia Court of Appeals in the Nation's capital. That court is not restricted in any way to review any and all errors they believe are material to the outcome of the case, and I believe, combined with the combatant status review tribunal and the administrative review board, does provide a due process for these detainees in a way that does not jeopardize this legislation, should it be ultimately reviewed by the U.S. Supreme Court.

Actually, I think it might surprise some of our colleagues to be talking about this issue because they may well have thought we addressed this issue late last year when we passed the Detainee Treatment Act. The fact is, in the Hamden case, handed down in June, the U.S. Supreme Court said Congress had not made sufficiently clear its intention to apply the Detainee Treatment Act to pending cases. Therefore, it went on to decide the Hamden case, refused to throw out the appeal based on a lack of jurisdiction, and, in fact, left us with a situation where about 300 of the detainees at Guantanamo Bay have about 600 applications for writs of habeas corpus pending in American courts.

The United States provides adequate evidentiary hearings to ensure that detainees held at Guantanamo Bay are, in fact, unlawful combatants, and, No. 2, pose a threat to the United States national security interests. These detainee status hearings and other procedures provided by the United States to terrorist detainees at Guantanamo Bay meet, and in many ways exceed, the requirements for prisoners of war under article V of the Geneva Conventions.

As I mentioned, on top of these status hearings, meaningful judicial review is provided by the U.S. Federal Court of Appeals. Final judicial review is provided of those decisions. These status hearings and judicial review mechanisms were codified as part of that Detainee Treatment Act.

The District of Columbia Circuit Court of Appeals—which many in this Chamber have referred to as the second highest court in the land—has the power to review not only whether the Department of Defense faithfully followed the procedures prescribed by Congress but also whether those procedures comport with the U.S. Constitution.

For some to say, as I actually heard this morning in a hearing we had before the Senate Judiciary Committee, that ''no meaningful judicial review'' is provided to unlawful combatants is, I claim, inaccurate and misleading.

While providing these judicial procedures, Congress saw fit to foreclose the possibility of a flood of habeas corpus petitions overwhelming the Federal courts and distracting our men and women in uniform from prosecuting the war effort. The status hearings and judicial review mechanisms are intended to satisfy the meaningful review requirement in the absence of the ability to file a petition for writ of habeas corpus. Alien enemy combatants, whether lawful or unlawful under the Geneva Conventions, have never been found by the U.S. Supreme Court to have a right to file a habeas corpus petition in American Federal courts.

In 1950, the U.S. Supreme Court ruled in a case called Eisentrager v. Johnson that enemy combatants held by U.S. forces overseas are not entitled to the ''privilege of litigation'' and cannot sue our military in our courts.

Beyond the constitutional arguments for removing habeas jurisdiction, there are important practical considerations, as well, as explained in the Eisentrager decision. The Supreme Court explained clearly and eloquently why we cannot let enemy combatants sue the U.S. military and our soldiers in American Federal courts. It said:

> Such trials would hamper the war effort and bring aid and comfort to the enemy . . . It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigation would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

These burdens, as identified by the U.S. Supreme Court placed on our military by enemy combatant litigation, persist today.

The Department of Justice has detailed the significant burdens. It has said:

> The detainees have urged habeas courts to dictate conditions on [Guantanamo Naval] Base ranging from the speed of Internet access afforded their lawyers to the extent of mail delivered to the detainees.

More than 200 cases have been filed on behalf of 600 purported detainees. Curiously, this number exceeds the number of detainees actually held at Guantanamo Bay, which is closer to 500.

Also, according to the Department of Justice:

> This habeas litigation has consumed enormous resources and disrupted the day-to-day operation of Guantanamo Naval Base.

The United States also notes that this litigation has had a serious negative impact on our war against al-Qaida. According to the U.S. brief, in the al-Qaida case:

> Perhaps most disturbing, the habeas litigation has imperiled crucial military operations during a time of war. In some instances, habeas counsel have violated protective orders and jeopardized the security of the base by giving detainees information likely to cause unrest. Moreover, habeas counsel have frustrated interrogation critical to preventing further terrorist attacks on the United States.

Michael Ratner, a lawyer who has filed lawsuits on behalf of numerous enemy combatants held at GTMO, boasted about disrupting U.S. war efforts to a magazine—Mother Earth magazine. He said:

> The litigation is brutal for [the United States]. It's huge. We have over one hundred lawyers now from big and small firms working to represent the detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation . . . with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there?

Former Attorney General Bill Barr explained the folly of applying American criminal procedure and judicial process and standards to questions of the enemy combatants. He said:

> In armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its national defense powers to neutralize the external threat and preserve the very foundation of all our civil liberties. Here the Constitution is not concerned with handicapping the government to preserve other values. Rather it is designed to maximize the government's efficiency to achieve victory—even at the cost of ''collateral damage'' that would be unacceptable in the domestic realm.

Attorney General Barr brought these concerns into relief with the very telling hypothetical example. He said:

> Let me posit a battlefield scenario. American troops are pinned down by sniper fire from a village. As the troops advance, they see two men running from a building from which the troops believe they had received sniper fire. The troops believe they are probably a sniper team. Is it really being suggested that the Constitution vests these men with due process rights as against the American soldiers? When do these rights arise? If the troops shoot and kill them—i.e., deprive them of life—could it be a violation of [their] due process [rights]? Suppose they are wounded and it turns out they were not enemy forces. Does this give rise to Bivens' Constitutional tort actions for violation of due process? Alternatively, suppose the fleeing men are captured and held as enemy combatants. Does the Due Process Clause really mean that they have to be released unless the military can prove they were enemy combatants? Does the Due Process Clause mean that the American military must divert its energies and resources from fighting the war and dedicate them to investigating the claims of innocence of these two men?
>
> This [simply] illustrates why military decisions are not susceptible to judicial administration and supervision. There are simply no judicially-manageable standards to either govern or evaluate military operational judgments. Such decisions invariably involve the weighing of risks. One can easily imagine situations in which there is an appreciable risk that someone is an enemy combatant, but significant uncertainty and not a preponderance of evidence. Nevertheless, the circumstances may be such that the President makes a judgment that prudence dictates treating such a person as hostile in order to avoid an unacceptable risk to our military operations. By their nature, these military judgments must rest upon a broad range of information, opinion, prediction, and even surmise. The President's assessment may include reports from his military and diplomatic advisers, field commanders, intelligence sources, or sometimes just the opinion of front line troops. He must decide what weight to give each of these sources. He must evaluate risks in light of the present state of the conflict and the overall military and political objectives of the campaign.

So as we take up this important issue of terrorist tribunals, and reaffirming our commitment in the Detainee Treatment Act, which we passed just last year, these unlawful and lawful combatants—the enemy captured on the battlefield—are entitled to process, but they are not entitled to all of the rights and privileges of an American citizen in a court of law.

It is only just and fitting we do provide this alternative process through reviewing the combat status tribunal decisions to make sure we are accurate as a matter of fact in detaining enemy combatants of the United States. It is entirely appropriate that we have an annual administrative review board to look at and determine whether these individuals should continue to be detained in light of additional information and in light of changing circumstances. And it is entirely appropriate that they be provided an appellate review in the District of Columbia Court of Appeals on all bases of decision in the combat status review tribunal and the administrative review process and also that they be provided an appeal following any conviction of a war crime by a military tribunal. But it is not appropriate to lapse into a

pre-9/11 mentality of treating the war on terror as simply another law enforcement action, treating it as another criminal prosecution just such as any other criminal prosecution that occurs on a regular basis in our State and Federal courts. The dangers of doing so mean we will have lapsed back into those perhaps happier times but the blissful ignorance those happier times produced.

We are at war. We have an enemy that continues to try to explore our vulnerabilities. And as we know from the recently disrupted plot emanating out of London, al-Qaida and our enemies continue to try to find vulnerabilities that will allow them to hit us here at home. It is absolutely essential that we live up to our responsibilities as elected representatives of the American people to maintain the safety and security of those people by making sure we meet the obligations imposed upon Congress and the Federal Government by the U.S. Supreme Court and that we provide basic rights as dictated by the Court in the Hamdan decision. But it is not appropriate that we tie the hands of our military commanders, that we perhaps undermine our ability to prosecute and win this war on terror and keep America safe by treating this war on terror and the appellate rights of detainees in a way that makes it harder for us to keep America safe.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. CHAMBLISS). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is now closed.

EXECUTIVE SESSION

NOMINATION OF FRANCISCO AUGUSTO BESOSA, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF PUERTO RICO

The PRESIDING OFFICER. Under the previous order, the hour of 5:20 p.m. having arrived, the Senate will proceed to executive session for the consideration of Executive Calendar No. 920, which the clerk will report.

The legislative clerk read the nomination of Francisco Augusto Besosa, of Puerto Rico, to be a United States District Judge for the District of Puerto Rico.

The PRESIDING OFFICER. Under the previous order, the time until 5:30 p.m. shall be equally divided between the chairman and ranking member of the Judiciary Committee. The chairman is recognized.

Mr. SPECTER. Mr. President, I have sought recognition to recommend to my colleagues the confirmation of Francisco Augusto Besosa to be a district court judge for the District of Puerto Rico.

Mr. Besosa comes before the Senate with an impressive record. He received his Bachelor's degree from Brown University in 1971 and his law degree from Georgetown University Law Center in 1979. Prior to attending law school, he served as an intelligence officer in the U.S. Army and was awarded the Meritorious Service Medal.

Mr. Besosa has had a distinguished career as a practicing lawyer in Puerto Rico. He has spent 70 percent of his time practicing in the Federal courts, with the balance in the State courts. His principal occupation has been in the civil field, and he has had considerable trial practice. Mr. Besosa is currently a partner in the law firm of Absuar Muniz Goyco and Besosa, a firm he joined in 1994. The American Bar Association has rated Mr. Besosa ''well qualified.''

Mr. Besosa was passed out of the Judiciary Committee unanimously. I am pleased in my capacity as chairman of the committee to recommend him to my colleagues for confirmation.

Mr. LEAHY. Mr. President, today, as we begin the last week of this legislative session, the Senate considers the nomination of Francisco Augusto Besosa for a lifetime appointment to the U.S. District Court for the District of Puerto Rico. Mr. Besosa's nomination was reported unanimously to the Judiciary Committee on Thursday of last week.

Last week the Judiciary Committee held two business meetings dedicated to judicial nominations. I want to thank all Senators for working with us to expedite consideration of nominations like that of Mr. Besosa. I cooperated last Tuesday with the Chairman's request for a Special Executive Business Meeting. I came to the meeting and established the quorum. The Chairman had said that the meeting would be held to burn holds on two non-controversial circuit court nominees. I agreed to try to expedite consideration of the nomination of Kent Jordan, a nominee to the Third Circuit. Peter Keisler's nomination to the D.C. Circuit is, however, by no means non-controversial. Nonetheless, in an effort to work with the Chairman I stayed and the Republicans held over the Keisler nomination, as well.

Then, although we had not discussed either in advance, in order to be accommodating, I did not object when, at the request of Senator GRASSLEY and Senator DEWINE, the nominations of John Alfred Jarvey and Sara Elizabeth Lioi were also held over. Those nominations will now be reviewed and available for consideration by the Committee later this week in accordance with the rules of the Committee.

Mr. Besosa's nomination was unanimously reported at our regular Thursday business meeting. In addition, we reported a number of other judicial nominations, including one for a judicial emergency vacancy that was given expedited consideration. I thank the Chairman for his kind words in which he acknowledged our cooperation.

The Democratic Senators on the Committee have worked hard to accommodating the Chairman's demanding schedule. The Chairman has already held three hearings during the last three weeks and has another scheduled for this week, in addition to another special business meeting. We have held 18 judicial nominations hearings this year, including a Supreme Court hearing, as well as two additional executive nominations hearings.

I have been saying for some time that I feared we would sacrifice progress on nominations that can be moved for debate on controversial nominations. It appears that my fears will be realized this week. This Wednesday afternoon and evening, a hearing on the highly controversial nomination of Michael Wallace to the Fifth Circuit has been noticed and renoticed. As the times have changed, it has become even less likely that it will be helpful or productive during this extremely busy time of year. Of course, Mr. Wallace is the first appellate court nominee in 25 years to have been rated unanimously not qualified by the ABA peer review committee.

After today, the Senate will have confirmed 31 judicial nominees this year. The Republican Senate confirmed only 17 of President Clinton's judicial nominees in the 1996 session. The Senate has confirmed seven circuit court nominees, which is seven more than the Republican Senate confirmed with a Democratic President during the 1996 session. That year, Republicans would not consider or confirm a single appellate court nomination for an entire year-long session of the Senate, not one.

This is a far cry from the days when the Republican Congress pocket filibustered more than 60 of President Clinton's nominees, refusing even to bring them up for a vote in Committee. Of course, during the 17 months that I was Chairman, we were able to confirm 100 of President Bush's nominees. In 20 months of Republican control, with a Republican President, even counting Mr. Besosa's confirmation today, that number will stand at about half that—just 53.

We could have accomplished more this year if the White House had sent over consensus nominees early in the year. The White House did not. Many of the nominees we are now trying to consider now were not even nominated until July. Regrettably, the administration concentrated on a few highly controversial nominees and delayed until recently sending nominations and